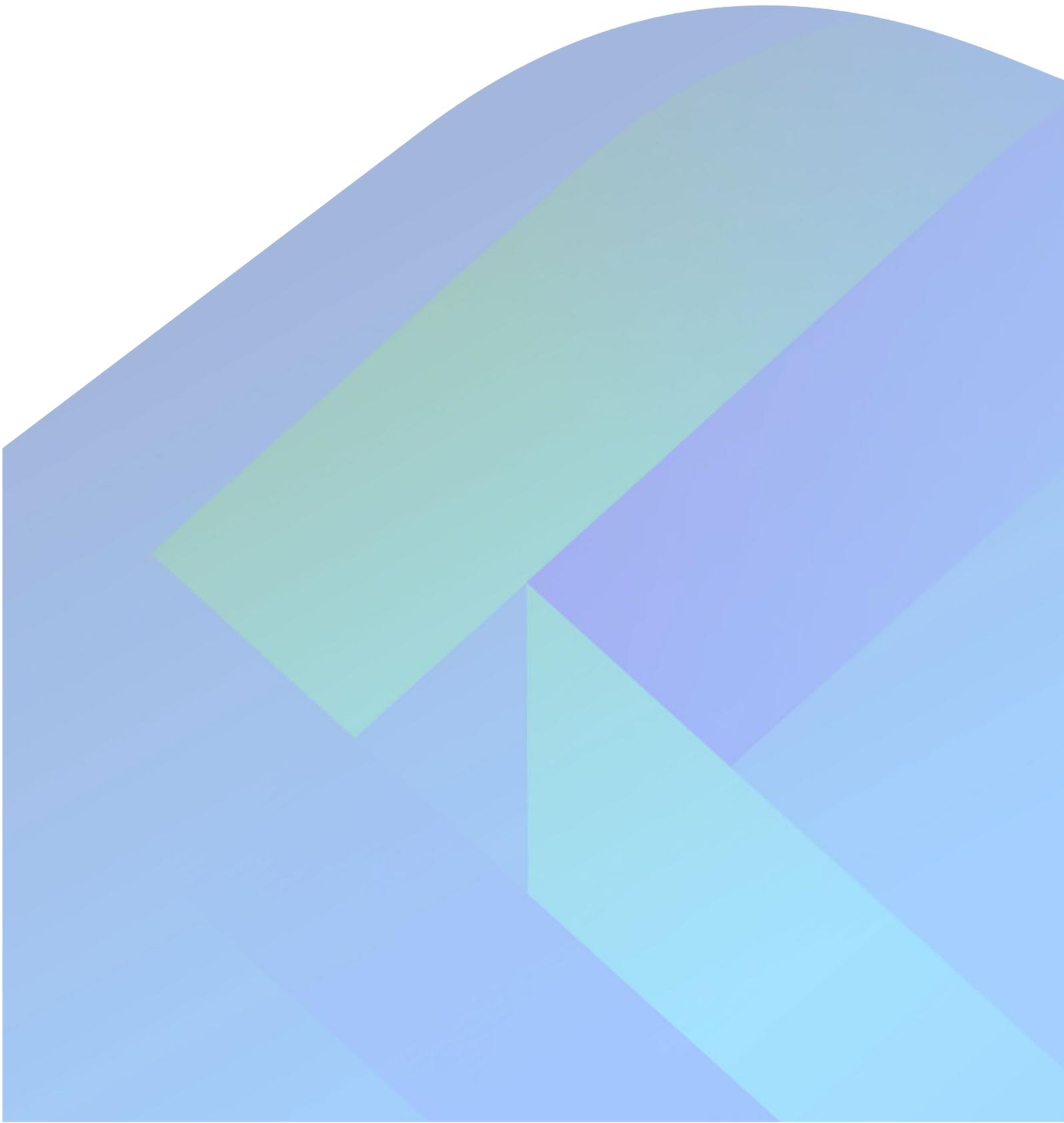


# Guidelines on ESMA procurements



# Guidelines on ESMA procurements

For potential tenderers when considering the submission of a tender in response to a procurement procedure of the European Securities and Markets Authority.

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## 1 Disclaimer

This document aims to help tenderers with the preparation and submission of offers in response to procurement procedures issued by the European Securities and Markets Authority (ESMA).

Tenderers should note that any information contained in this document can in no way be regarded as a commitment on the part of ESMA to enter into any contract. In addition, tenderers should note that information in this document is not legally binding. The document will be updated if the applicable legislation is changed or if it is necessary to add more details or clarify information already provided.

ESMA publishes detailed information related to all its procurement procedures on its website: <https://www.esma.europa.eu/about-esma/internal-organisation/procurements>

This guidance complements the procurement documents for each specific procedure. The tender specifications describe the service or supplies that ESMA intends to purchase, the timetable, how the offers will be evaluated, what the participating tenderers are required to provide as part of their offer, and the resulting contractual terms. In case of any inconsistency between these guidelines and individual tender specifications, the individual tender specifications shall prevail.

Further information on the activities of ESMA which may be of interest to tenderers can be found on ESMA's website [www.esma.europa.eu](http://www.esma.europa.eu).

## 2 Legal Framework



The procurement procedures of ESMA are governed by the following EU Regulations

- Title VII and Annex I of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

In addition to the abovementioned legislation, it should be noted that:

- Principles arising from the Court of Justice of the European Union's case law in the field of procurement are binding on ESMA;

- The staff of ESMA are bound by the [European Code of Good Administrative Behaviour](#) in their relations with the public. This includes the management of procurement procedures, subject to the restrictions laid down in the above-mentioned legal provisions.

### **3 Basic information about calls for tender issued by ESMA**

ESMA publishes information related to all its procurement procedures on its [website](#).

#### **3.1 Types of procurement procedure**

The type of procedure used by ESMA is selected in accordance with the expected contract value. The two types of procedure most commonly used by ESMA are the negotiated procedure and the open procedure. One of the differences between these procedures is how potential tenderers are invited to participate.

##### **3.1.1 Negotiated Procedure**

The negotiated procedure can be used when the resulting contract is estimated to have a value equal to or below 143,000 EUR. In this type of procedure, ESMA draws up a shortlist of potential tenderers, based on their field of activity and expertise and the needs of ESMA. For procedures between 15,000 EUR and 143,000 EUR, ESMA promotes them prior to launch on its website and requests expressions of interest to participate. The shortlisted candidates (those who express an interest and/or those which are identified by ESMA) are invited to submit an offer and only offers received from these candidates are evaluated. The minimum number of candidates to be invited to participate in a negotiated procedure is dependent upon the value of the call.

- Above 60,000 EUR and equal to or below 143,000 EUR = Minimum five candidates must be invited
- Above 15,000 EUR and equal to or below 60,000 EUR = Minimum three candidates must be invited
- 15,000 EUR and below = Minimum one candidate must be invited

If ESMA considers that the offers received can be improved, including financial offers, negotiations can be carried out on equal terms for all tenderers.

##### **3.1.2 Open Procedure**

The open procedure is most frequently used when the resulting contract is estimated to have a value above 143,000 EUR, but it can also be used for contracts below that value.

All ESMA open procedures are published in the Official Journal of the European Union, through a contract notice. Each procedure is posted on ESMA's website where a link is provided to the Funding & Tender opportunities portal through which tenderers can access the procurement documents (invitation to tender letter, tender specifications, draft contract and other annexes). In an open procedure, ESMA does not draw up a shortlist or send specific invitation to tender letters to potential tenderers. Participation in this procedure is open on equal terms to all interested entities as described in the section on 'participation' below.

## 3.2 Participation

Participation in ESMA's public procurement procedures is open on equal terms to all natural and legal persons coming within the scope of the EU Treaties. This includes all legal entities registered in the EU and all natural persons having a permanent residence in an EU Member State or having the nationality of an EU Member State.

Procurement procedures of ESMA are not covered by the WTO Multilateral Government Procurement Agreement (GPA). Tenderers established in third countries (non-EU countries) do not have the right to participate in procurement procedures unless international agreements in the field of public procurement grant them the right to do so. In case there is no such agreement, or the agreement does not apply to the kind of contracts put out to tender, tenderers of third countries are not entitled to participate.

Tenderers from the following third countries are considered eligible based on the following signed and ratified agreements in the field of public procurement:

### **EEA Agreement:**

**Iceland, Norway and Liechtenstein** (granted access to all procurement procedures of the Union institutions, agencies and bodies, regardless of their value, under the same conditions as the EU economic operators, subject to the limitations set out in Annex XVI of the EEA Agreement).

### **Stabilisation and Association Agreements:**

**Republic of North Macedonia, Albania, Montenegro, Serbia, Bosnia and Herzegovina and Kosovo** (granted access to all procurement procedures of the Union institutions, agencies and bodies, regardless of the value of the purchase, under the same conditions as the EU economic operators, subject to the general security based restrictions).

### **Association Agreements:**

**Georgia, Moldova and Ukraine** (granted access to procurement procedures of the Union institutions, agencies and bodies, for all supplies with the value equal or above 133,000 EUR, subject to general exceptions)

International public-sector organisations (e.g. United Nation bodies, World Bank, International Monetary Fund etc.) are entitled to participate in procurement procedures of ESMA where such participation is explicitly announced in the procurement documents. If the statute or act of establishment of an international organisation specifies that it cannot participate in a competitive procedure, ESMA may use a negotiated procedure without prior publication of a contract notice in accordance with para. 11.1.m Annex 1 of the Financial Regulation.

Please note the above list is not exhaustive and is subject to updates. In case of queries regarding eligibility to apply, please submit your question via the appropriate method as indicated in the invitation to tender letter for the relevant call for tenders. Additionally, each tender specification may define an exceptional ad hoc admission of tenderers from non-eligible countries to participate in a call for tenders, without creating a precedent for future calls.

The rules of access to the market apply to single tenderers as well as partners in a joint tender. It is to be noted that a group of eligible tenderers or a single tenderer could choose a subcontractor from a non-eligible country unless specific limitations are stated in the procurement documents. ESMA reserves the right to limit subcontracting to subcontractors based in eligible countries i.e. EU Member States and/or the third countries detailed above which have signed and ratified agreements in the field of public procurement.

### **3.3 Nature of contractual relationship resulting from contract award**

When preparing an offer, tenderers should take full account of the procurement documents which include: Invitation to tender letter, tender specifications, including its annexes, for example the draft contract, as they will define and govern the contractual relationship (including contract type and duration) to be established between ESMA and the successful tenderer.

#### ***Direct Contract***

In direct contracts the subject, remuneration and length of implementation of the contract are defined at the outset. Once signed, they may be directly implemented without any further formalities or contract procedures.

#### ***Framework Contract***

Sometimes the contractual relationship between ESMA and the successful tenderer will be governed by a special type of contract known as a “framework contract”. A framework contract establishes a mechanism for the future repetitive acquisition of supplies, services or works, when the contracting authority can define the subject matter of the procurement but does not know when and what quantity it will need during a certain period of time.

Only the implementation of the framework contract through specific contracts/order forms is binding for ESMA and the signature of a framework contract does not impose an obligation on ESMA to conclude specific contracts/order forms with a framework contractor.

Actual orders can be placed only after the framework contract is signed, in the form of “**specific contracts**” or “**order forms**” concluded in pursuance of the framework contract.

A **single framework contract** is a contract concluded with only one economic operator, detailing the basic terms for a series of specific contracts/order forms to be concluded over a given period, particularly regarding the duration, subject, price and implementation modalities.

Sometimes, ESMA may conclude **multiple framework contracts in cascade** with a number of contractors. A system of priority would be established whereby specific contracts or order forms would be placed with the first priority contractor. If the goods and/or services are unavailable from the first priority contractor, the specific contract or order forms would then be placed with the second priority contractor and so on.

ESMA may also conclude **multiple framework contracts with reopening competition**, with a number of contractors where not all the terms are laid down in the framework contract and without a system of priority being established among the contractors. ESMA shall reopen competition and request all the contractors to provide offers on the basis of more precisely formulated terms. Any resulting specific contract will however be based on the scope of the multiple framework contract and will not deviate from it so much that it may be considered to be entirely different from the multiple framework contract.

In a multiple framework contract with reopening competition, ESMA will invite all multiple framework contractors to make a specific offer, in accordance with the time limit foreseen in the multiple framework contract, according to the specific terms which ESMA shall define for the individual assignment. Among the offers that fulfil the minimum requirements, ESMA would then award the specific contract to the contractor which has submitted the best offer on the basis of the award criteria set out in the tender specifications for the “reopening” competition.

## 4 Should I submit an offer?



It is important that you make an informed decision about whether or not to commit resources to the submission of an offer. ESMA will not reimburse expenses incurred in the preparation and submission of offers, including expenses related to site visits, opening sessions, etc. In order to make an informed decision about submitting an offer, you should carefully consider the following aspects covered hereinafter.

## 4.1 Subject matter of the contract

You should read carefully the subject matter of the contract mentioned in the contract notice published in the Official Journal of the European Union, and also described fully in the tender specifications. Pay particular attention to the minimum capacity requirements and whether you are able to meet these alone or through reliance upon the capacities of other entities.

No more than one tender and, in case of lots, no more than one tender per lot, can be considered from the same tenderer. If the same tenderer submits more than one tender only the latest tender will be considered. You may not refer to earlier submitted tenders to complement, clarify or correct your latest tender.

## 4.2 Value of the contract

In case of direct contracts, the value is fixed and expressed as a price in the contract signed as a result of the call for tenders.

In case of framework contracts, the tender specifications contain indications on the maximum volume of goods and/or services which may be purchased under the framework contract. Although ESMA always aims to give its best estimate in good faith, tenderers should be aware that any information on maximum ceiling is purely indicative, is not binding on ESMA, and should not be considered as a warranty as to the probable value of the framework contract. In any case however, the maximum ceiling of the framework contract will not be exceeded.

## 4.3 Lots

When a procurement procedure is divided into lots, this is explicitly mentioned in the contract notice and tender specifications. In this case, unless stated otherwise in the contract notice and tender specifications, tenderers may submit offers for one or more lots.

Each individual lot is assessed by ESMA independently of any other lot. Offers which cover only part of one lot or are declared as being conditional on the award of any other lots within the particular procurement procedure are not permitted. ESMA reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

## 4.4 Variants

Unless specifically stated otherwise in the tender specifications, departures from any technical or financial requirements of the tender specifications, or from any contractual conditions, are not permitted.

ESMA will disregard any variants described in an offer, and further reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

## 4.5 Submitting tenders as a group of companies and/or using subcontracting

A **joint tender** is an offer submitted by a group of two or more economic operators. All group members assume joint and several liability towards the contracting authority for the performance of the contract as a whole.

**Subcontracting** is when the contractor enters into a legal commitment (subcontracts) with one or more economic operator(s) in order to deliver part of the work, service or supplies described in the tender specifications. The contractor retains full liability towards the contracting authority for performance of the contract as a whole.

Unless stated otherwise in the contract notice and/or the procurement documents, joint tenders from a group of economic operators and subcontracting are allowed in response to a procurement procedure issued by ESMA. Offers may even combine both approaches. The offer must clearly state whether each entity involved is acting as a partner in a joint tender or as a subcontractor. This also applies in cases where the various companies involved belong to the same group, or where one is the parent company of the others.

### 1) Joint tenders from a group of economic operators

For submission of an offer, ESMA does not require a group of economic operators to take any specific legal form; it can be a permanent, legally established grouping or one which has been constituted for a specific procurement procedure. However, the selected group may be required to adopt a given legal form after it has been awarded the contract if this change is necessary for proper performance of the contract. Such a requirement would be announced in the procurement documents.

Joint tenders must clearly identify each member of the group and which member has been appointed as the lead partner. They shall indicate which service provider will be carrying out which tasks. Provided a contract is concluded, ESMA will treat all contractual matters (e.g. payments) exclusively with the lead partner, whether or not the tasks are performed by another member of the group.

Members of a joint tender assume joint and several liability towards ESMA for the performance of the contract as a whole. Statements in the offer seeking to limit the liability of each member of the group or specifying that more than one contract should be signed if the joint tender is successful, are incompatible with the principle of joint and several liability. ESMA will disregard any such statement contained in a joint tender, and further reserves the right to reject such

offers without further evaluation on the grounds that they do not comply with the tender specifications.

**Joint tenders** will be evaluated as follows:

- The exclusion criteria and grounds for rejection from the procedure will be evaluated in relation to each legal entity of the group individually. Every member of the group shall provide a declaration of honour on exclusion criteria and may be requested to provide the supporting evidence during the evaluation for contracts above the EU Public Procurement directive thresholds or for negotiated procedures when announced in the procurement documents;
- The selection criteria regarding the legal, economic, financial, technical and professional capacity will be evaluated on a consolidated basis unless specified differently in the procurement documents;
- The award criteria will be evaluated in relation to the offer as a whole.

In case of contract award to a group of economic operators in a joint tender, ESMA will sign the contract with the lead partner who will be duly authorised by the other group members to sign on their behalf via a power of attorney. The ESMA power of attorney is published as an annex to the tender specifications (see document called “tenderer application template”). The signed power of attorney will form part of the contract.

Any change in the composition of the partners in a joint tender during the procurement procedure may lead to the rejection of the tender. Any change in the composition of the partners in a joint tender after the signature of the contract may lead to the termination of the contract. The replacement of a partner not having access to procurement or in a situation of exclusion is not allowed.

## 2) Offers proposing the use of subcontractors

Tasks detailed in the technical specifications may be subcontracted to other service providers unless stipulated otherwise in the contract notice or tender specifications, e.g. ESMA may specify that certain tasks cannot be subcontracted or require that contractors do not subcontract to subcontractors without access to the EU market.

The following shall not be considered subcontracting:

- a) Use of workers posted to the contractor by another company owned by the same group and established in a Member State (“intra-group posting”<sup>1</sup>).
- b) Use of workers hired out to the contractor by a temporary employment undertaking or placement agency established in a Member State (“hiring out of workers”<sup>2</sup>).
- c) Use of workers temporarily transferred to the contractor from an undertaking established outside the territory of a Member State and that belongs to the same group (“intra-corporate transfer”<sup>3</sup>).
- d) Use of staff without employment contract (“self-employed persons working for the contractor”) to perform substantially the same tasks as the staff with employment contract (“employees”), without the tasks of the self-employed persons being particular well-defined parts of the contract.
- e) Use of suppliers and/or transporters by the contractor, in order to perform the contract at the place of performance, unless the economic activities of the suppliers and/or the transporting services are within the subject of the call for tender.
- f) Performance of part of the contract by members of an EEIG (European Economic Interest Grouping), when the EEIG is itself a contractor or a group member.

**The persons mentioned in points a), b), c) and d) above will be considered as “personnel” of the contractor as defined in the contract.**

The contractor retains full liability towards ESMA for performance under the contract as a whole.

Accordingly:

- ESMA will treat all contractual matters (e.g. payments) exclusively with the contractor, whether or not the tasks are performed by the subcontractor;
- Under no circumstances can the contractor of ESMA avoid liability towards ESMA on the grounds that the subcontractor is at fault.

If a subcontractor provides a very large part of the financial capacity OR executes a very large part of the tasks, ESMA may demand that the subcontractor signs the contract as well. In this

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<sup>1</sup> Article 1, 3, (b) of [Directive 96/71/EC concerning the posting of workers in the framework of the provision of services](#)

<sup>2</sup> Article 1, 3, (c) of [Directive 96/71/EC concerning the posting of workers in the framework of the provision of services](#)

<sup>3</sup> Article 3, (b) of [Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer](#)

case ESMA will check that the subcontractor is not in a situation of exclusion and that it has access to the market. Additionally, tenderers may be requested to state the value of the contract that they propose to subcontract and/or the percentage of subcontracting foreseen.

**Subcontractors** in the offers will be evaluated as follows:

- The exclusion criteria and grounds for rejection from the procedure will be evaluated in relation to each proposed subcontractor individually, only if explicitly requested in the procurement documents. ESMA reserves the right to request a declaration of honour on exclusion criteria from a subcontractor, even if not explicitly requested in the procurement documents and may also request supporting evidence from the subcontractor;
- The selection criteria regarding the legal, economic, financial, technical and professional capacity will be evaluated on a consolidated basis unless specified differently in the procurement documents. The evidence must be included in the offer for subcontractors only if the capacity of those subcontractors is necessary to satisfy the minimum capacity requirements;
- The award criteria will be evaluated in relation to the offer as a whole.

During the procurement procedure, if a subcontractor does not meet the exclusion or selection criteria or is subject to restrictive measures, the contracting authority will request their replacement with a new subcontractor.

Any change in subcontracting including the introduction of new subcontractors must be in line with the provisions of the contract. During the execution of the contract, the contractor needs the express written permission of ESMA to replace a subcontractor.

## **5 What should an offer consist of and how should it be submitted?**

In general, tenders in response to a procurement procedure are submitted using the Funding & Tender opportunities portal.

Precise details about how to submit an offer to ESMA and the documents and information which should be included with your offer are set out in the procurement documents for the specific call.

## 6 What are the implications of submitting an offer?

### 6.1 Acceptance of ESMA's contractual terms and waiver of own business terms

Submitting an offer in response to a procurement procedure launched by ESMA shall be deemed to imply that tenderers:

- accept all the terms and conditions stipulated in the tender specifications and all other documents related to the procurement including the draft contract; and
- waive their own terms of business such that any resultant contractual relationship shall be governed exclusively by the terms of the contract.

ESMA will disregard any qualification, disclaimer or intention to the contrary and further reserves the right to reject such offers without further evaluation on the grounds that they do not comply with the tender specifications.

However, in exceptional circumstances, ESMA may agree on different contractual terms. Should such be the case, it will be specified in the tender specifications.

### 6.2 Period of validity

Unless the tender specifications stipulate a different time period, tenderers will be bound by their offer for **9 months** from the closing date for offer submission.

### 6.3 Guarantees

Only on a case-by-case basis and following risk analysis ESMA may require one of four types of guarantee (tender guarantee, guarantee for pre-financing, performance guarantee or retention money guarantee). If and when such guarantees are requested, it will be announced in the procurement documents along with conditions for the release of the guarantee. The costs of any such guarantee shall be borne by the tenderer/contractor.

### 6.4 No obligation on ESMA to award

When awarding a contract, ESMA undertakes to compare the offers in the light of the criteria laid down in the contract notice and/or the tender specifications. However, publishing a procurement procedure does not oblige ESMA to award the contract to a tenderer simply because their offer fulfils those criteria. ESMA also reserves the right to decide not to award the contract to any tenderer and to cancel the procedure at any time before award. ESMA is not liable for any compensation in such circumstances.

## 6.5 Tax exemption

ESMA is exempt from all duties, taxes and other charges, including VAT in the EU under Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union of 8 April 1965 annexed to the Treaty on the Functioning of the European Union. Exemption is granted to the contracting authority by the governments of the Member States, either through refunds upon presentation of documentary evidence or by direct exemption.

## 6.6 Applicable Law

Unless the tender specifications stipulate otherwise, contracts resulting from a procurement procedure issued by ESMA shall be governed by Union law, complemented, where necessary, by the national substantive law of France.

Any dispute between the parties in relation to the interpretation, application or validity of the contract which cannot be settled amicably shall be brought before the General Court of the European Union.

## 6.7 Protection of personal data

As an EU Agency, ESMA is subject to Regulation (EU) 2018/1725<sup>4</sup>, forming the primary legal basis for measuring the lawfulness of personal data processing. The applicability of this Regulation in the context of public procurement procedures and resulting contracts of ESMA has the following implications:

- As Data Controller, ESMA shall ensure that personal data contained in your offer and/or handled in the context of the procurement procedure (e.g. names of individuals, CVs, contact details, financial details of individuals, declarations of interest) is processed in compliance with the Regulation;
- The selected contractor acts as a processor of ESMA with regard to personal data handled under the contract in the sense of Article 29 of the Regulation. In accordance with this provision, the contractor:
  - o shall only process personal data on documented instructions of ESMA as the Data Controller,

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<sup>4</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

- ensures that persons processing personal data have committed themselves to confidentiality,
- undertakes appropriate technical and organisational measures to ensure the confidential and secure processing of personal data needed for the implementation of the contract,
- deletes or returns to ESMA all personal data after the end of the provision of services,
- makes available to ESMA all information necessary to demonstrate compliance with the obligations pursuant to the Regulation and allows for or contributes to audits and inspections by or on behalf of ESMA,
- notifies personal data breaches to ESMA,
- when engaging a subcontractor, shall impose the same obligations with regard to personal data protection.

## **6.8 Confidentiality & public access to documents**

ESMA undertakes to protect commercial interests by treating all information contained in an offer as confidential. ESMA will not disclose any information where such disclosure would hinder application of the law, be contrary to public interest, harm tenderers legitimate business interests or distort fair competition.

In the general implementation of its activities and for the processing of procurement procedures in particular, ESMA observes Regulation (EC) No. 1049/2001 of the European Parliament and Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

## **6.9 Agreement to deliver the goods/services in accordance with the contract**

Contracts concluded following a public procurement procedure cannot be subsequently modified. Changes are limited to administrative issues such as modification of bank account or to circumstances caused by external and unforeseen factors.

## **7 Is contact between ESMA and tenderers allowed?**

Contact between ESMA and tenderers outside the strict requirements of the procedure are prohibited save in exceptional circumstances and only under the conditions mentioned hereinafter.

## 7.1 Before the closing date for offer submission:

At the request of the tenderer, ESMA may provide additional information solely for the purpose of clarifying specific issues arising from the tender specifications. Should a tenderer have a question they should proceed as follows:

- the question should be submitted using the Funding & Tender opportunities portal. Access to the Funding & Tender opportunities portal is via a call specific link published on the ESMA website under each specific open call for tenders, or via the link provided in the contract notice in Tender Electronic Daily (TED).

ESMA will reply to requests for additional information as soon as possible and no later than six calendar days before the deadline for the receipt of tenders. ESMA is not bound to reply to requests for additional information made less than six working days before the closing date for offer submission.

ESMA may also, of its own accord, inform tenderers of any error, inaccuracy, omission or other clerical error in the text of the contract notice, invitation to tender letter or technical specifications and their annexes.

In the interests of fairness and equal treatment, any additional information will be sent in an identical manner simultaneously to all tenderers:

- published on the Funding & Tender opportunities portal. Accordingly, for procurement procedures, tenderers should use Funding & Tender opportunities portal to register for updates and receive published answers to clarifications and possible changes such as an extension of the deadline.

Any additional information provided by ESMA should be regarded as an integral part of the tender documentation.

## 7.2 After the closing date for offer submission:

If clarification is required by ESMA or if obvious clerical errors in the offer need to be corrected, ESMA may contact the tenderer, provided the overall terms of the offer are not materially modified as a result.

If the reply clearly contradicts or modifies the original offer, ESMA may reject the offer.

In the event of a negotiated procedure, ESMA reserves the right to open further negotiations with the tenderer on the technical and/or financial offer made, in order to adapt them to the requirements set out in the tender specifications or any additional document and in order to find the most economically advantageous tender. However, negotiations may not concern the

minimum (compulsory) technical or administrative requirements in the tender specifications. During negotiations equal treatment of all tenderers will be ensured.

## 8 The opening of offers



ESMA is required to formally appoint an opening committee for all calls above 143,000 EUR in value. In case of an open procedure, a public opening meeting will be held to open all offers either virtually or physically on the date and at the time indicated in the contract notice and invitation to tender.

The opening committee will work under conditions of confidentiality and absence of conflict of interest and will sign a declaration confirming these conditions.

In an open procedure, two representatives of each tenderer are allowed to attend the virtual or physical opening session. If the tenderer wishes to attend the opening, they should notify ESMA, via e-mail, of the name of the individual(s) who will attend the opening, no later than two working days before the opening session in case of physical meeting or no later than one working day before the opening session in case of virtual opening. ESMA reserves the right to require the representative to provide proof of identity. Further details for attending the opening session are provided in the invitation to tender letter.

The public part of the opening session will be strictly limited to checking whether each offer received is compliant with the following requirements:

- the closing date for the receipt of offers specified in the tender specifications is respected;
- the offers are electronically protected until the official opening.

## 9 How are offers assessed?



ESMA is required to formally appoint an evaluation committee for all calls exceeding 143,000 EUR. The offers will be assessed by an evaluation committee working under conditions of confidentiality and absence of conflict of interest and will sign a declaration confirming these conditions.

Once the evaluation is completed, the evaluation committee will draw up a report for the responsible authorising officer, who will take the final decision on the award of the contract.

Offers complying with the formal requirements checked during the opening session will be assessed based on the criteria explicitly announced in the tender specifications.

Please note that the tender specifications further specify the exclusion, selection and award criteria and, accordingly, you are strongly recommended to refer to those tender specifications for more details on all evaluation steps.

## 9.1 Exclusion Criteria

The sole purpose of the exclusion criteria is to determine whether an operator is eligible to participate in the procurement procedure and whether an operator may be awarded the contract. The only criteria which are applied are those set out in Article 136 of the Financial Regulations.

### **Exclusion criteria evidence to be submitted with the offer:**

- Declaration on honour on exclusion criteria

For any call with a value above 15,000 EUR, tenderers must provide a signed and dated declaration on honour on exclusion criteria, certifying that they are not in one of the exclusion situations listed in the template (the declaration will be attached to the tender specifications). ESMA reserves the right however to request such a declaration for calls with a value equal to or below 15,000 EUR.

Declarations should be completed for the legal entity and for natural persons with power of representation, decision making or control over the legal entity.

A declaration is required from the tenderer and each member of the group in case of a joint tender. If a declaration is required from subcontractors, in the case of subcontracting, this will be specifically requested in the tender specifications.

- Exclusion criteria evidence to be submitted:

For calls with a value equal to or below 143,000 EUR, a signed and dated declaration on honour, submitted with the offer is sufficient, without the need to provide supporting evidence. ESMA however, reserves the right to require the tenderer to provide additional evidence.

For calls with a value above 143,000 EUR, ESMA may ask the tenderer to provide further evidence to prove they are not in one of the exclusion situations listed in the declaration on honour.

Additional information on the different certificates frequently requested across EU Member States to evidence tenderers are not in a situation of exclusion is available at <https://ec.europa.eu/tools/ecertis/#/homePage>

- Early Detection and Exclusion System (EDES)

Before taking the decision to award a contract, ESMA will consult the Early Detection and Exclusion System (EDES), which contains information on candidates and tenderers found to be in one of the exclusion situations set out above. In case the proposed contractor is included in the database, ESMA will not award the contract.

## 9.2 Selection Criteria

The tenderer's capacity to perform the contract is assessed based on their proven;

- Legal capacity,
- Economic and financial capacity,
- Technical and professional capacity.

Tenderers are required to submit a declaration on honour on meeting the selection criteria (the declaration will be attached to the tender specifications), however, the precise details of all documents required to prove the above-mentioned capacities are stated in the tender specifications. The documents provided by tenderers to prove that they meet the selection criteria will be used solely to assess their capacity to perform the contract and will not be considered when offers are evaluated against the award criteria.

During the evaluation of selection criteria, the focus is on the quality of the track record of the tenderer and not on the quality of the offer. Accordingly, information related to the technical proposal and to the financial offer should not be introduced in this part of the offer.

For calls with a value equal to or below 143,000 EUR, ESMA may dispense with the requirement for documentation in relation to selection criteria, according to its assessment of the risks involved.

## 9.3 Compliance with minimum requirements

Your offer will also be assessed for compliance with the minimum requirements of the tender specifications. Tenders are considered not to meet the tender specifications and therefore to be rejected if they:

- do not comply with minimum requirements laid down in the tender specifications;

- propose a solution different from the one that is imposed;
- propose a price above the fixed maximum set in the specifications or in the contract notice;
- are submitted as variants, when the contract notice or the specifications do not authorise them;
- do not comply with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU and compliance with data protection obligations resulting from Regulation (EU) 2016/679 and Regulation (EU) 2018/1725.

The tenderer will be informed of the ground for rejection without being given feedback on the content of the tender other than on the non-compliant elements.

## 9.4 Award Criteria



The evaluation committee will evaluate the offers against the award criteria stated in the tender specifications. No criteria other than those stated in the tender specifications will be used.

### **Quality evaluation (quality award criteria)**

The quality evaluation of the offers will be based on the criteria listed in the tender specifications. To ensure the quality evaluation takes full account of the needs of ESMA, a weighting is assigned to each criterion and stipulates a minimum threshold for each criterion, and/or for the quality award criteria as a whole.

At the end of the quality evaluation, each offer will be assigned an overall quality score and assessed whether or not the minimum quality threshold was met.

### **Financial evaluation (price award criteria)**

The financial offer of those tenderers whose technical offer met the minimum quality threshold for the quality award criteria will be considered for the identification of the most economically advantageous tender, provided that the financial offer is made within the maximum budget specified in the tender specifications.

In most ESMA calls for tenders, the most economically advantageous tender will be identified by comparing the overall quality score of the offer and its price, in accordance with the formula

set out in the tender specifications. The offer with the highest value obtained using this formula will be regarded as the most economically advantageous tender.

## 10 How are results communicated?

During the evaluation period, ESMA will not provide any information on an on-going procurement procedure. If a tenderer is not contacted, this should not be regarded as either a positive or negative sign. Tenderers will be informed of the outcome of the procurement procedure as outlined below.

### 10.1 Notification of results

As soon as ESMA has made a decision about to whom the contract should be awarded, a notification letter will be sent simultaneously to all tenderers by e-mail. The letters to unsuccessful tenderers will state the grounds on which the decision was taken.

In case of a contract value exceeding the relevant thresholds of the Public Procurement Directive (143,000 EUR), ESMA undertakes not to sign the contract until a period of at least ten calendar days has elapsed following the electronic dispatch of the notification letters, so that unsuccessful tenderers have sufficient time to react if necessary.

### 10.2 Requests for additional information

If tenderers are notified that their offer has not been successful, they may request additional information by letter or e-mail. ESMA will reply within fifteen calendar days of receiving a written request and provide the name of the successful tenderer, the characteristics, relative advantages and the price of the successful tender. However, only those tenderers who are not in an exclusion situation and whose tender is compliant with the procurement documents will be provided with additional information. ESMA is not free to disclose any information affecting the commercial interests of other tenderers.

### 10.3 Award Notice

Once the contract is signed, ESMA will publish an award notice in the Official Journal of the European Union summarising the results of the procurement procedure, where the contract value exceeds the relevant threshold of the Public Procurement Directive of 143,000 EUR.

For contracts with a value below the Directive threshold (except very low value contracts equal to or below 15,000 EUR), ESMA publishes on its website<sup>5</sup>, a list of contracts concluded during

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<sup>5</sup> [Esma Library | European Securities and Markets Authority \(europa.eu\)](https://www.esma.europa.eu)

the previous year with values above 15,000 EUR and equal to or below 143,000 EUR. The list is published by 30th June each year.

## 11 Remedies

Tenderers may lodge an appeal against the contract award decision. This must be done within two months of the decision which is contested. The court responsible for hearing appeal procedures is the General Court of the European Union:

General Court of the European Union

Rue du Fort Niedergrünewald

L-2925 Luxembourg

Tel.: (352) 4303-1

Fax: (352) 4303 2100

E-mail: [GeneralCourt.Registry@curia.europa.eu](mailto:GeneralCourt.Registry@curia.europa.eu)

[www.curia.europa.eu](http://www.curia.europa.eu)

The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union. A complaint must be made within two years of the date upon which the facts on which your complaint is based became known. Additionally, you must have already contacted ESMA regarding this complaint before contacting the European Ombudsman.

The European Ombudsman

1 Avenue du President Robert Schuman

CS 30403

FR – 67001 Strasbourg Cedex

Tel.: +33 (0)3 88 17 23 13

Fax: +33 (0)3 88 17 90 62

[www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)